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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The petitioner, Deaton, Inc., a corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on October 25, 1974, as corrected on rehearing January 15, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 502 F. 2d 1221, 82 LRRM 2545, and 75 LC ¶ 10,407. The order correcting an erroneuos factual statement in said opinion and deny-

ing rehearing en banc is incorporated in the opinion reported at 502 F. 2d 1221, and separately reported at 88 LRRM 2384. The decision of the National Labor Relations Board ordered by the Court of Appeals to be enforced, is officially known as 203 NLRB No. 172 and unofficially reported at 83 LRRM 1294 and 73 LC ¶ 25,421 (1973). The decision of the National Labor Relations Board directing the election which was the basis of the decision last cited is reported officially at 187 NLRB 780 and unofficially at 76 LRRM 1129 and 71 LC ¶ 22,635 (1971). All these opinions and decisions together with the judgment sought to be reviewed are printed in the Appendix to this petition as part of this volume.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 21, 1974. A timely petition for rehearing en banc was denied on January 15, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ¶ 1254(1).

QUESTIONS PRESENTED

1. Whether it is not a denial of due process of law for the Court of Appeals to adjudge that it is immaterial, upon judicial review of an order of the National Labor Relations Board, that other Board cases reach an opposite result on truly indistinguishable facts, as to whether owner-operator truck drivers of ICC-certificated carriers are employees or independent contractors?

2. Whether *United States v. Silk*, 331 U.S. 704 (1947), is still the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

29 U.S.C. § 152(3), 61 Stat. 137:

"§ 152. *Definitions*

"When used in this subchapter—

* * * * * * *

"(3) The term 'employee' . . . shall not include . . . any individual having the status of an independent contractor . . . ."

The Motor Carrier Safety Regulations promulgated by the U. S. Department of Transportation, 49 CFR Parts 390-397, inclusive, are to some extent involved in this case and the excerpts from them which we deem pertinent are printed as a part of the appendix in this volume.

The Interstate Commerce Commission Rules pertaining to Lease and Interchange of Vehicles and Identification of Vehicles, 49 CFR Parts 1057 and 1058, are to some extent involved in this case and are printed as a part of the appendix in this volume.

STATEMENT OF THE CASE

Deaton, Inc. is an irregular route common carrier which is engaged in the carriage of goods for hire in several southeastern states, operating under the authority granted in a certificate of

the Interstate Commerce Commission. The over-the-road truck-drivers operating trucks under its authority comprise these classes of persons:

Drivers of Deaton-owned trucks, conceded to be its employees.

Owner-drivers. These individuals own one or more trucks, which they lease to Deaton and drive one of these trucks regularly or intermittently. They are paid by Deaton a percentage of revenue as rent, and are not paid separately for driving.

Non-owner drivers of leased trucks. These individuals drive trucks leased to Deaton by owner-drivers or other persons, and are paid by them, being paid nothing by Deaton.

In 1971, Service Employees International Union, local No. 623, AFL-CIO, petitioned the National Labor Relations Board for Certification as bargaining representative of a unit of persons including all three of the above classes of persons. Deaton, Inc. contended that only the first of these classes were its employees within the meaning of the Labor-Management Relations Act. 29 U.S.C. § 152(3), 61 Stat. 137, and that the bargaining unit sought was therefore inappropriate.

The National Labor Relations Board decided by a vote of 3 to 1 that all three classes were Deaton's employees and ordered an election. Chairman Miller dissented on the ground that:

> "When the instant record is measured against the standards set forth in *Greyvan* [*United States v. Silk*, 331 U.S. 704 (1947)] and the legislative history to the 1947 amendments, the lease owners must be found to be independent contractors."

Following an election in which all three classes were permitted to vote, the Board certified the Union as bargaining representa-

tive of the unit it had petitioned for. Thereafter Deaton informed the Union that it would not bargain to set the wages, hours and fringes that were controlled by the lessors who paid the third class of drivers, that it was not willing to make the concession of exercising control over that particular area. A charge followed that Deaton had unlawfully refused to bargain, the Board issued a complaint, and found Deaton guilty of the charge, Chairman Miller again dissenting on the ground that "I consider the lease owners involved herein to be independent contractors rather than employees of the Respondent [Deaton]."

The facts material to the consideration of the questions presented in this petition may be stated as follows. Following a decision in 1964 that Deaton's owner-operators were its employees, *Deaton Truck Line, Inc. v. NLRB*, 337 F. 2d 697 (5th Cir., 1964), cert. denied sub nom. *Teamsters Local 612 v. NLRB*, 381 U.S. 903 (1965), Deaton proceeded to renegotiate its truck leases to make it explicit that the relationship was that of independent contractors and that the control which Deaton had the right to exercise over drivers of leased trucks was to be the minimum consistent with the Department of Transportation and Interstate Commerce Commission regulation found in the appendices to this petition. These regulations are quite extensive and Deaton is required to comply with them just as any other certificated carrier must.

Both the Board and the Court below were unwilling to conclude that DOT-ICC mandatory requirements as a matter of law precluded the possibility of an independent contractor relationship between any certificated carrier and owner-operators. Therefore they both enumerated in their opinions a list of "controls" which assertedly were "additional" to those required by regulations, but which in fact are virtually all mandatory requirements. For example, the Board's opinion cited these factors controlled by the carrier:

Initial determination of qualification of any driver hired by a lease owner (required by 49 CFR §§ 390.31-.32, 391.11,-.21,-.23,-.35,-.41, 1057.5(e)).

Disqualification of any driver who fails to perform satisfactorily (required by 49 CFR §§ 391.15,-.25, 392.4,-.5).

Requiring leased equipment to be inspected every 20 days (required by 49 CFR § 396.2,-.9).

Exclusive use of all leased equipment for the term of the lease (required by 49 CFR § 1057.4(a)).

Requiring drivers of leased trucks to submit a daily driver's log, trip report and manifests (required by 49 CFR §§ 390.32, 395.8, 396.7, 396.9, 1057.5(f)).

Requiring leased trucks to bear Deaton's name and an identification number (required by 49 CFR §§ 1057.5(e), 1058.1,-.2,-.3).

Maintaining a personal file on all drivers with respect to accidents and qualifications (required by 49 CFR §§ 391.51,-.25,-.27).

Investigating accidents of all drivers (required by 49 CFR § 394.10).

The Court of Appeals' opinion goes to some pains to contend that Deaton's investigation of drivers' qualifications exceeds the bare minimum required by the DOT regulations and may involve a subjective element "different in quality from merely making sure he was not barred by law from commercial driving." But this is precisely what the regulations require, an in depth investigation which includes subjective opinion judgments and the type of evidence a reasonable man would seek to get assurance of safe driving qualifications and habits, not bare paper qualifications. See, for example, 49 CFR § 391.-23(c).

The only factors which could arguably constitute controls not required by these regulations, are matters which are essential to operating any truck line, be it with employee drivers or independent contractor drivers. To enumerate these:

Item: "[Deaton's] performance of dispatching services for both company and lease drivers alike." (187 NLRB at 782, infra at A-88) The end result to be accomplished by whatever means is the movement of freight from point A to point B within a reasonable time. Dispatching a truck consists of telling someone what the freight is and where to pick it up and deliver it. These instructions would be the same whether the relation is employment or independent contractor. They pertain to and are essential to the end result. They are equally referrable to either relation. All motor carriers must dispatch all trucks, including all the dozens of carriers whose owner-operators the Board holds to be independent contractors. These are the same kind of instructions one gives to a cab driver or airline ticket agent without any thought that this could even tend to imply an employment relationship. Although the Board said this was an "additional control" the Court said in footnote 9 to its opinion, infra at A-118: ". . . we place no reliance on this factor."

Item: Taking measures, such as threat of lease cancellation, to encourage or induce drivers of leased trucks to deliver shipments within a reasonable time rather than just loafing. It is the common law duty of every common carrier to make deliveries within a reasonable time. 13 Am. Jur. 2d, Carriers § 364; *Chicago & A.R. Co. v. Kirby*, 225 U.S. 155 (1912). The carriers exertion of control over this end result is as referrable to an independent contractor relationship as to one of employment, and is equally necessary.

Item: Taking measures, such as threat of lease cancellation, to curb dishonesty on the part of drivers of leased trucks. But

a motor carrier is required to tolerate stealing no more by independent contractors or their employees, than by its own employees. A carrier is not required to elect between helplessly standing by while being ripped off, and assuming the legal incidents of an employer-employee relation. A housewife who changes dairies because the old milkman cheated her out of money or was habitually late, does not thereby become the milkman's employer. This type of end result control is equally referrable to the independent contractor relationship and no one can seriously suppose that any motor carrier (including the numerous ones which for which other NLRB panels have sustained the independent contractor relation to owner-drivers) would or could act any differently from Deaton in these particulars.

Item: When a shipper tells Deaton that driver X will not be permitted on the shipper's premises, whether because of the driver's misconduct or for whatever reason, if X is a Company-owned truck driver, Deaton will not send him there; and if X is the driver of a leased truck, Deaton gives the lessor the message, and the lessor must then make arrangements for another driver on that shipper's premises, or to have Deaton load the trailer for the lessor. This is a peculiar basis on which to argue that Deaton exercises employment-type control over those drivers; *au contraire*, it involves control exercised by a shipper, or more precisely, illustrates how certain types of control are in real life exercised by persons who no one contends are the employers of the drivers. It is the same as if I order some plumbing service at my house but tell the boss not to send plumber Z and that I will not let him in my house. Whatever this proves, it could not support the argument that Deaton is exercising any control inconsistent with the independent contractor relation; this is exercise of control by the shipper, who is clearly an independent contractor.

In short Deaton's operation is no different from any ICC-licensed motor carrier using leased trucks and exercising the real-

life minimum of controls over the drivers. Deaton's truck leases unequivocally provide that the relation shall be that of independent contractor, and that the lessor shall be the employer of any driver he assigns to the truck:

> "Contractor shall . . . direct and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees. . . .
>
> "Parties hereto agree that 'carrier' is without authority to control said operation, except to the extent required by law and to accomplish the end result for which this lease is executed."

And in actual fact that is all the control that Deaton exercised at times material. Drivers do not have the same working conditions. Deaton provides group hospital, life, and workmen's compensation insurance on the drivers of company owned trucks, and gives them vacations. It provides none of these to drivers of leased trucks. Many of the lessors give different benefits to drivers of their trucks leased to Deaton such as various plans of hospital insurance, paid vacations and retention of gasoline discounts; these fringes are the result of agreements between the drivers and the lessors who pay their wages, and Deaton is not a party to these agreements. Deaton has no Company rules applicable to drivers of leased trucks. Lessors may sign the dispather's log and assign any of the drivers on their payroll to take the load. Deaton does not reprimand drivers of leased trucks, conducts no safety meetings for them, exercises no control over extended leaves of absence; it does not control or have anything to say concerning where drivers of leased trucks secure their gas and oil or obtain services on their equipment. It does prescribe these matters for drivers on its own payroll, as well as the routes those drivers must follow. Drivers of leased trucks do not have to follow a prescribed route and are free to stop for gas or sojourn overnight wherever they wish. Lessors make the arrangements with leased truck drivers as to compensation, and

some pay more and some less and they use different pay formulas; lessors compete with one another for the better drivers. There has been no collective bargaining contract between Deaton and any Union for a number of years. The driver of a Company owned truck, that is, who is on Deaton's payroll, must get the Company's permission to be excused from work; Deaton has nothing to do with excusing the driver of a leased truck, and such a driver would have to take the matter up with the lessor, the man who was paying him. Deaton has never paid any form of compensation to an injured driver of a leased truck. Deaton does not pay or deduct Social Security taxes for owner-operators and has an Internal Revenue Service ruling that they are independent contractors. Deaton does not maintain a pool of qualified drivers from which multiple truck owners can select drivers. It does not require leased vehicles to be parked on its property when not in use. Truck owners who lease to Deaton also lease trucks to other carriers. They will swap drivers from one carrier to another and Deaton has nothing to say about this. Deaton does not allow its own Company drivers to take trucks home but it is quite usual that owner-operators take their trucks home. Company drivers are not allowed to swap loads around, but it is a common practice that drivers of leased trucks swap loads around, particularly on week ends, so that they can get a load consigned in the direction of their homes. Drivers terminated by one owner-lessor can go and have gone to work for other owner-lessors without consultation with or approval by Deaton. The lease owners have substantial capital investment, about $20,000 a truck. Some are profitable, others have gone bankrupt. Their opportunity for profit or loss depends on their initiative and ability to operate their trucks efficiently and economically. The expenses are largely borne by them, not Deaton (fuel, oil, tires, repairs, wages of other drivers and helpers, taxes, etc). The more successful owner-drivers become multiple owners and may own, as one of Deaton's lessors does, as many as 43 trucks, representing an investment of about $750,-000. Such multiple owners have complete autonomy in estab-

lishing wages and working conditions of their drivers. Some lessors own other businesses; some are widows of former drivers, who own several trucks and hire drivers for them; some have their own maintenance shops to work on their trucks.

The NLRB concluded, Chairman Miller dissenting, that the drivers of leased trucks were Deaton's employees. The Court below held that it did not matter if in other truly indistinguishable cases the NLRB has reached the opposite result. In enforcing the Board's order, the Court reasoned that its function is limited to checking the record for minimal requirement of substantial evidence and that equal protection of the laws was none of its affair.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decision of This Court in Weinberger v. Wiesenfeld, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975).

This Court held in *Weinberger v. Wiesenfeld*, — U.S. —, 43 U.S.L.W. 4393 (March 19, 1975) that the federal government is prohibited from denying the equal protection of the laws, under the Due Process Clause of the Fifth Amendment of the U.S. Constitution, just as the states are forbidden to deny equal protection, by the terms of the Fourteenth.

> "'[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."' Schneider v. Rusk, 377 U.S. 163, 168 (1964); see also Bolling v. Sharpe, 347 U.S. 497, 499 (1954). This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment. See, *e.g.*, Schlesinger v. Ballard, — U.S. — (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Frontiero v. Richardson, 441 U.S. 677 (1973)."

Any previous doubts as to whether the federal government is obliged to dispense equal-handed justice on the same basis as the states are bound to do under the equal protection clause have now been put to rest.

Nevertheless, the Court of Appeals for the Fifth Circuit has held in this case that the scope of its judicial review of a decision of the National Labor Relations Board does not extend to the question whether the Board is affording equal protection of the laws. In so holding it has ordered enforcement of a Board order which violates the Fifth Amendment,

and says it is "not its province" to consider such argument. Conceding that Board cases reaching the opposite result are truly indistinguishable, it holds this to be proper (502 F. 2d 1221 at 1228):

> "Deaton asks us to remand the case for rehearing by the entire Board on the ground that the 1971 decision is out of harmony with subsequent Board cases. Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on fact findings as the employee-independent contractor dichotomy, we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy of the Act. . . . ."

In other words, "policy" and personal philosophy of the men who make the decision must prevail over equal application of the law to indistinguishable facts. This is a long way from government of laws and not of men. I am subject to one law, but my identically situated competitor is subject to a different and more favorable law because his judge had a different philosophy.

For a number of years the decisions of the NLRB on whether drivers of trucks leased to certificated motor carriers are employees or independent contractors, have been in total and irreconcilable conflict. Lest the Court think us guilty of partisan hyperbole, we respectfully point out that the most biting denunciation of the NLRB's arbitrariness and total inconsistency in this area has come not from management, but from the national special labor counsel for the International

Brotherhood of Teamsters, the distinguished Milwaukee union lawyer, Gerry M. Miller, writing in "The Uses of the Past at the Miller Board," Southwestern Legal Foundation, Labor Law Developments 1974, 163, 164, 167, 170-172, 187:

> Board doctrine on independent contractors has traditionally been phrased in terms of the so-called common-law right to control test of agency: . . . .
>
> Under the Miller Board, this legal rhetoric has not changed, and no prior decisions have been expressly overruled. But one must add that, notwithstanding these facts, the specific content and direction of this law has changed dramatically, with the caveat that *it now depends on the composition of the Board panel that rules on a particular case.* . . .
>
> Despite some effort by Board decisions-drafters to smooth over the sharp edges of this division of opinion, the result has been, so far, seemingly *to make the outcome of the case predictable, depending upon the composition of the panel that decides it.* If the panel includes Members Fanning and Jenkins, employee status will be found, if it included Members Kennedy and Penello, it will not; when Chairman Miller's vote is decisive, he will opt against employee status: regardless of result, he may write a separate opinion emphasizing the factual detail he thought determinative. This division of opinion recently intensified when on January 18, 1974, the Board split three-to-two in ruling that 500 drivers in a computerized nine-state steel hauling operation with twenty-three terminals were independent contractors [George Transfer & Rigging Co., Inc., 208 NLRB No. 25, 85 LRRM 1097]. . . .
>
> So it appears that stability of legal doctrine in this vital area is solely on the abstract rhetorical surface. Beneath, concrete legal doctrines have been tacitly over-

ruled, important holdings in past cases reversed sub silentio, *the identity of the panel that decides the case* together with the manner in which the facts are characterized and summarized, are seemingly the all-important variables. As a technical matter, *the current law on this subject is clearly deficient* as a meaningful guide for parties, practitioners, or even regional decision-writers, *since the opinions cannot be harmonized* and *many read like laundry lists of factors pro and con employee status with no illumination as to the weight to be ascribed to each in the final balancing process.* . . .

> The topics just discussed were not selected because they present a representative statistical sample of the Board's case load since 1970, but, instead, because they appear to be representative fields, so to speak, *on the "cutting edge" of the developing law in which strong union interests are pitted against equally strong employer concerns.* [Emphasis added.]

Certainly this union labor law expert does not regard this inconsistency in Board decisions as *abstract or academic;* on the contrary, he uses the same terminology as the opinion of the Fifth Circuit did, but for the opposite purpose, to describe the superficial agreement of Board Members on governing legal principles as "abstract" while the true inconsistency in result is nothing if not one of concrete facts and actual cases, lying indeed in a "vital area" on the "cutting edge" of sharply conflicting interests of management and labor.

So much to dispel the notion that we are dealing with an abstraction or an academic quibble. We disagree completely with this union writer's view of what the law is, being of the opinion that *U. S. v. Silk*, 331 U.S. 704 (1947), is still the authoritative statement of the law, but certainly he is right in his view that the matter is of the utmost concrete and prac-

tical importance and that the Board decisions are in intolerable and irreconcilable conflict.

But the Fifth Circuit says, that is too bad, that is no concern of ours; we will let people be treated differently on indistinguishable facts so long as a given panel majority makes a list of "substantial evidence" to support its conclusion even though exactly the same total of evidentiary facts are present in another case, from which another panel majority selects a different list and reaches from them the opposite conclusion.

We believe the Constitution does not permit such inequality of application of the law by an administrative agency and that the Fifth Circuit abdicated its judicial function when it refused to consider the denial of equal protection which is so evident in the Board decisions.

A review of NLRB cases for the past several years fully confirms the state of irreconcilable conflict in the NLRB decisions and the fact that the result could be predicted on the basis of the composition of the panel, but on no rational basis.

In *Fleet Transport Co.*, 196 NLRB No. 61, 80 LRRM 1047 (1972), the NLRB, by a unanimous panel consisting of Chairman Miller and Members Kennedy and Penello, found that a carrier which exercised the control required by I.C.C./D.O.T. regulations was not the employer of leased truck drivers. The facts of that case are indistinguishable from the present one. As for any claim of "additional controls," that is, additional to I.C.C./D.O.T. regulations, the Board said in *Fleet Transport*:

> In our view, the kind of termination clause used in the lease herein, which gives the Employer an option to terminate by giving notice at specified intervals, with automatic renewal of the lease if the option is not exercised, is entirely consistent with independent contrac-

> tor status. Likewise, the fact that the Employer unilaterally determined the rates of commission paid to owner-operators and the terms of the lease may show that the Employer's bargaining power is vastly superior to any owner-operators, but such inequality of bargaining power is not peculiar to an employer-employee relationship.

In the present case also, nothing has been shown that is "peculiar to the employer-employee relationship."

Conley Motor Express, 197 NLRB No. 57, 80 LRRM 1399 (1972), was a unanimous decision by the same panel which decided *Fleet Transport* (Miller, Kennedy and Penello), that owner-drivers were independent contractors in spite of the facts that the carrier made liberal cash advances and interest-free loans to owner operators, and financed their equipment, in addition to enforcing I.C.C./D.O.T. regulations.

But just as consistently as Chairman Miller and members Penello and Kennedy have found independent contractor status to exist on facts indistinguishable from those of the present case, the Board members who constituted the majority of the panel (Fanning, Brown and Jenkins) to whose lot it fell to decide the instant case, have just as consistently in recent years found an employment relationship on comparable facts. *Pony Trucking, Inc.*, 198 NLRB No. 59, 81 LRRM 1249 (1972) (Fanning and Jenkins; Kennedy dissenting) enforced *NLRB v. Pony Trucking, Inc.*, 486 F. 2d 1039 (6th Cir., 1973); *Tryon Trucking, Inc.*, 192 NLRB No. 123, 78 LRRM 1132 (1971) (Fanning and Brown; Miller dissenting). About the only reliable guide, then to predict whether the Board will hold owner-drivers of leased trucks, over whom the carrier exercises no significant control additional to I.C.C./D.O.T. regulations, to be employers or independent contractors, is what members of the Board sit on the panel which decided the case.

As Chairman Miller pointed out, in specially concurring on distinguishable facts in *Aetna Freight Lines, Inc.*, 194 NLRB No. 120, 79 LRRM 1042 (1971):

> In my view, my colleagues are sometimes too ready to find employee status in cases involving this industry. There has been a trend toward finding employee status in nearly every case, and to virtually eliminate by a sort of decisional fiat, any possibility of independent contracting in the trucking field.

More recently, the Board decisions continue to be determined on no discernible basis other than the makeup of the panel, *Portage Transfer Co.*, 204 NLRB No. 117, 83 LRRM 1398, 1400 (1973) (independent contractors; Miller and Penello; Fanning in dissent); *Boxwood, Inc.*, 209 NLRB No. 8, 85 LRRM 1278 (independent contractors; Miller and Kennedy; Fanning in dissent; *Local 814, Teamsters (Santini Bros., Inc.)*, 208 NLRB No. 22, 85 LRRM 1518 (1974) (independent contractors; Miller, Kennedy and Penello); *George Transfer & Rigging Co.*, 208 NLRB No. 25, 85 LRRM 1097 (1974) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent); *Pilot Freight Carriers, Inc.*, 208 NLRB No. 138, 85 LRRM 1179 (1974) (employees; Miller, Fanning, Jenkins); *Yellow Cab Co.*, 208 NLRB No. 121, 85 LRRM 1273 (1973) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent); *Kreitz Motor Express, Inc.*, 210 NLRB No. 11, 86 LRRM 1217 (1974) (independent contractors; Kennedy and Penello; Jenkins in dissent); *Daily Express, Inc.*, 211 NLRB No. 19, 86 LRRM 1355 (1974) (independent contractors; Kennedy and Penello; Fanning in dissent); *Columbus Green Cabs*, 214 NLRB No. 93, 87 LRRM 1375 (1974) (independent contractors; Kennedy and Penello, Fanning in dissent); *Fraley & Schilling, Inc.*, 211 NLRB No. 49, 87 LRRM 1378 (1974) (independent contractors; Jenkins, Kennedy and Penello); *Eck Miller Trans-*

portation Corp., 211 NLRB No. 12, 87 LRRM 1409 (1974) (independent contractors; Jenkins, Kennedy and Penello); *Ace Doran Hauling & Rigging Co.*, 214 NLRB No. 84, 87 LRRM 1525 (1974) (independent contractors; en banc; Miller, Kennedy and Penello; Fanning and Jenkins in dissent).

The latest decision, *Ace Doran Hauling & Rigging Co., supra*, decided November 8, 1974, is perhaps as egregious as any. In an earlier case involving the same ICC-regulated carrier, *Ace Doran Hauling & Rigging Co.*, 191 NLRB 428 (1971), the owner-operators were held to be employees by a panel majority of former Member Brown and Member Jenkins; Chairman Miller dissenting. The carrier was ordered to cease and desist from refusing to bargain in good faith, precisely as in this instant case. The Sixth Circuit then enforced the Board's order, 462 F. 2d 190 (1972). The carrier was therefore in exactly the posture Deaton is in now. Subsequently, the full five-member Board made an about face and a majority, consisting of Miller, Kennedy and Penello; Fanning and Jenkins dissenting, held the owner-operators were independent contractors, the majority's principal explanation being—

> In making our analysis we have in the instant case the advantage of a full and complete record covering the Employer's total operation, whereas in the [earlier] case . . . we had exercised our discretion not to grant a full review of the Regional Director's decision therein, which in any event related only to a portion of its total operations.

The majority did not find *any* changes had been made in the carrier's methods of operation. Only that it had a more complete record the second time around. The two dissenters said "the employer *may* now allow more trip leasing" than at the time of the earlier case, but also pointed out that the carrier "may" now be violating ICC regulations by its trip leasing practices. The majority said it expressed no opinion as to whether the carrier was now violating ICC or DOT regulations, it not being the Board's responsibility to police those regulations.

Mind you, this was the same carrier with no finding of any change in the method of operations. And the only arguable change would *in fact* constitute a violation of ICC regulations, 49 CFR §1057.4. For practical purposes, the Board's decisions are useless as a guide to conduct, as a basis of advice or prediction of outcome. Meaningful judicial review is impossible given the approach of the Fifth Circuit, because the decision is actually unprincipled. The partisans of Unions and management agree on one thing: that the Board's decisions on this question are in a state of irreconcilable inconsistency and are arbitrary. They deny the equal protection of the laws to Unions, carriers, and owner-operators.

Yet the Fifth Circuit says its job is done if it checks out the Board's list of indicia in a particular case, no matter how inconsistently the Board is acting in other cases where the *same* indicia, *pro and con,* are also present. We believe the Fifth Circuit abdicated its judicial responsibility and denied Deaton the equal protection of the laws, when it said the inconsistency and lack of rationally explicable principle of Board decisions are none of its affair. It must consider the sufficiency of evidence on the record considered as a whole; it must view other Board decisions to determine if they are arbitrary and capricious; it must see that the Board is not denying equal protection of the laws. The Fifth Circuit's notion of the policy of the Labor Management Relations Act cannot overcome the Constitutional requirement of equal protection. Our competitors operating the same way we do are allowed to deal with their lessors as independent contractors; they do not have to bargain collectively under the Labor Management Relations Act with their owner-drivers, and in fact have the protection of the antitrust laws against concerted activities by those persons which the Fifth Circuit holds our owner-drivers have the right to engage in. Neither the unions, the owner-drivers, nor the carriers are receiving the equal protection of the laws, but all are being dealt with arbitrarily. Yet the Court of Appeals for the Fifth Circuit

says that is outside of its province. The writ of certiorari should issue to correct this unconscionable and unconstitutional state of affairs.

2. **The Decision Below Conflicts With United States v. Silk (Harrison, Collector of Internal Revenue v. Greyvan Lines, Inc.), 331 U.S. 704 (1947).**

Please see the dissenting opinion of NLRB Chairman Miller in *Deaton, Inc.*, 187 NLRB 780, 782-4 (1973), Appendix, infra, pp. A-91-A-96.

We submit that the *Silk* case is still the law and is controlling on the facts of this case. This Court recognizes it is possible to operate a motor carrier consistently with DOT-ICC regulations, with independent contractor drivers. Some members of the NLRB recognize that possibility and others in effect do not. Those members have, "by a sort of administrative fiat," sought to overrule *U.S. v. Silk* while paying it theoretical lip service.

3. **The Court of Appeals for the Fifth Circuit Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.**

The Court below expressly disclaimed any responsibility in judicially reviewing an NLRB determination that drivers are employees or independent contractors, beyond a canvass of the factors relied on by the NLRB in making that particular determination; when in fact the same list of factors can be drawn up in every real-life case to support that determination or another list to support the opposite determination. By refusing to consider, indeed, by even disclaiming the power to consider the gross inconsistencies in the two lines of NLRB decisions on this question, the Court below has abdicated its judicial responsibility, its oath to uphold the Constitution, and its duty to re-

view and set aside arbitrary administrative action. This Court's powers of supervision are therefore invoked, to insure that judicial review of NLRB decisions shall not become a meaningless ceremony in which the Constitution falls victim to some undefined policy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted

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April 14, 1975

Certificate of Service

I hereby certify that on this 14th day of April, 1975, three copies of the Petition for Writ of Certiorari were mailed, properly addressed and postage prepaid, to the Honorable Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570, Counsel for the Respondent. I further verify that all parties required to be served have been served.

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